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February 25, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: September 22, 2004

Case Number: TSO-0148

This Decision concerns the eligibility of xxxxxxxxxxxxxxxxxxxx (hereinafter "the individual") for an access authorization. The regulations governing the individual's eligibility are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, the individual should be granted an access authorization. For the reasons detailed below, it is my decision that the individual's access authorization should be restored.

I. BACKGROUND

In April 2004, the Manager of the Personnel Security Department, National Nuclear Security Administration (NNSA), Department of Energy (DOE) issued a Notification Letter to the individual, stating that the DOE was in possession of derogatory information that created a substantial doubt concerning his continued eligibility for access authorization. In the Notification Letter, the Manager also informed the individual that he was entitled to a hearing before a hearing officer in order to respond to the information contained in the Notification Letter. The individual requested a hearing in this matter and the NNSA forwarded this request to the Office of Hearings and Appeals. I was appointed to serve as the hearing officer. In accordance with 10 C.F.R. § 710.25(e) and (g), I convened a hearing in this matter (hearing).

The Notification Letter finds security concerns related to the individual's behavior under Criteria K and L. 10 C.F.R. § 710.8(k) and (l). The notification letter bases the Criterion K concern on the individual's use of marijuana during the 1990's and his one time use of a drug prescribed for his wife. The notification letters bases the Criterion L security concerns on the individual's failure to follow the terms of a drug certification which he signed on January 21, 1982.

The individual was employed by a DOE contractor between 1982 and 1990. In order to obtain an access authorization, he completed a personnel security questionnaire (QNSP) on June 9, 1981. Individual's Exhibit #2. The DOE conducted a personnel security interview (PSI) on January 21 and 22, 1982. During the January 21 PSI, the individual discussed in detail his use of marijuana since his

graduation from high school in 1976. He also described his experimentation with hashish, speed, cocaine, and acid. Transcript of January 21, 1982 security interview at 29. 1 At the end of the interview the individual signed a written promise not to use illegal drugs while holding an access authorization. DOE exhibit #8 (hereinafter 1982 drug certification).

In 1984 the individual completed a second QNSP. Individual's exhibit #3. This QNSP including the question "Are you now, or have you been a user of any narcotic . . . ?" The individual responded affirmatively. The individual was never requested to complete another QNSP until the time he resigned his position at the laboratory in 1990. After leaving the laboratory in 1990 to pursue his education, he enrolled in a University in another state. He received his undergraduate degree (1992), masters degree (1995), and PhD (1998) all from the same University. After doing postgraduate research at that University he relocated to another state to teach at a University for two years. DOE Exhibit #7.

In June 2002 he accepted a position with a DOE contractor. During September 2002 he completed a QNSP. In this QNSP he disclosed that he had used marijuana between 1984 and 1986 and between 1995 and 2001.² DOE Exhibit #7. His answers to questions in that QNSP raised two security concerns presented in this proceeding: the individual violated his 1982 drug certification and he has used marijuana as recently as 2001.

The individual admits that he violated the drug certification and that he used illegal drugs from 1992 through 2001. At the hearing the individual presented information which he believes mitigates the security concerns. He testified on his own behalf, and he presented the testimony of his wife, his drug abuse counselor, his clinical psychologist, two co-workers, team leader and group leader. A summary of the testimony follows.

II TESTIMONY

1. The Individual

The individual testified about the events that transpired after he signed the 1982 drug certification. Immediately after signing the drug certification he went home and disposed of his drug paraphernalia. He did not use any marijuana for two years. Transcript of Hearing (Tr.) at 25. In 1984 he started dating a woman and she and her friends convinced him to use marijuana. Tr. at 26. At that time he recalls feeling guilty about breaking his promise to the DOE. Tr. at 77. He

1 The QNSP that the individual signed on June 9, 1981 does not include a question about the use of illegal drugs. Individual's exhibit #2. During the PSI the interviewer's first question about illegal drugs use indicated she was aware of the individual's use of illegal drugs. She asked "Another area I'd like to discuss with you is . . . the use of illegal drugs. . . . if you can tell me when you first experimented with [marijuana] and the extent of your use of it since that time?" Transcript of January 21, 1982 PSI at 11. The individual's response to the questions about drugs suggests that he was aware the interviewer knew about his illegal drug use. This indicates to me that the individual disclosed his illegal drug use during an interview with a field investigator.

2 He disclosed his 1984-1986 use of marijuana in response to the question "Have you ever illegally used a controlled substance while . . . possessing a security clearance" Question 24(b), DOE Exhibit #7.

discontinued the relationship and using marijuana in 1986. Tr. at 27. After he stopped using marijuana in 1986, he considered reporting his use of marijuana to the DOE. However, because of fear of losing his job he did not report the 1984-1986 marijuana use. Tr. at 79.

The individual testified that his next use of marijuana occurred after he left DOE employment in 1990. Tr. at 28. He started using marijuana in 1992. Tr. at 29. Between 1992 and 1997 his typical pattern was to smoke marijuana a couple of times a week with other students. Tr. at 32. During this six year period on several occasions he went for several months without using any marijuana. Tr. at 32. He testified that he used marijuana less frequently between 1997 and 2000, perhaps 10 to 15 times a year. Tr. at 32. At the beginning of 2001, he decided that he was in a position of responsibility and that using marijuana could damage his reputation. Tr. at 36. He therefore decided to stop using marijuana. He did not use any marijuana for six months. Tr. at 38. However, he attended a conference in November 2001 and met an old friend. The friend convinced him to smoke a part of his marijuana cigarette. Tr. at 37. After this incident the individual came to the conclusion that the use of marijuana was continuing a self destructive pattern, and he committed himself to never again use illegal drugs. Tr. at 48.

The individual testified that when he signed the 1982 drug certification, he was aware that his signature was a promise not to use illegal drugs and he realized that his 1982 access authorization was granted on the basis of his written promise not to use illegal drugs. Tr. at 44-46. However, because of peer pressure and his own immaturity he violated that promise. He testified that he is now a different person than he was in 1984. He has a family, has finished his education, has a responsible job and his judgment has improved. Tr. at 49. He testified "I made up my mind before even becoming aware of this job that I'm now going to stop. So whether I'd taken this job or not, I was still a professor and my intentions were to stop - - to stop forever." Tr. at 49. He summarized by saying "I'm a different person, and I have more responsibilities now." Tr. at 50. He testified that his November 2001 marijuana use was the last time he will ever use marijuana. Tr. at 31.

He testified that he reported his 1984-1986 marijuana use and his use of marijuana in the 1990's on the 2002 QNSP because he did not want to return to DOE and continue his prior misrepresentations. He testified that he feels guilty about his failure to report his marijuana use in the 1980's. Tr. at 81. He testified that his employment is important to him, but he is proud that he has provided accurate information on his 2002 QNSP even if it costs him his position with the DOE. He indicated that though the disclosure on the 2002 QNSP of his 1984-1986 marijuana use has caused him a great deal of difficulty, he would never change his decision to provide complete and accurate information. Tr. at 81. He was asked if he ever failed to report drug use on a QNSP. He indicated that he has filled out a QNSP on three occasions; 1981, 1984 and 2002. Individual's exhibit #3, #4, and DOE exhibit #7. He testified that on each of those QNSPs he accurately answered all of the questions and never withheld any derogatory information. Tr. at 83.

Finally, he testified about the use of his wife's prescription drug. He testified that in 2002 when his wife was visiting her mother, he became ill. He called her and learned she had taken their supply of Tylenol with her and that the only pain medication in the home was that prescribed for his wife. He took one of the pills in order to be able to get some rest. Tr. at 54.

2. The Individual's Group Leader

The group leader has occasionally met with the individual during professional meetings since the 1980's. Tr. at 114. Since the 1980's the group leader has known many of the individual's coworkers and supervisors. He hired the individual in 2002 on the basis of the individual's good professional reputation. Tr. at 114. During the 2 ½ years the individual has been employed at the lab, the individual has worked with the 120 employees supervised by the group leader. During that period the group leader has met with the individual monthly and has had an opportunity to evaluate the individual. Tr. at 106. He believes the individual is honest, trustworthy and technically qualified. The group leader believes the individual has been straightforward in relating to him the mistakes he has made and the DOE security concerns. The group leader believes that during the period in which the individual has had difficulty obtaining his access authorization, the individual has demonstrated a commitment to the changes in his behavior required to hold an access authorization. Tr. at 111.

3. Individual's wife

The individual's wife testified that she met the individual in February 1986, they were married in December 1989 and their daughter was born in 2002. Tr. at 117. She was aware of the individual's marijuana use when they first met. She indicated that she told the individual she did not approve of marijuana use and encouraged him to stop using it. Tr. at 117.

She and the individual are currently separated and are meeting with a marriage counselor. Tr. at 120. She testified that the individual is trustworthy and since joining the DOE in 2002 has been very committed to his job. She does not believe that he will ever again act in a way that would jeopardize his employment. Tr. at 120.

The individual's wife testified about the individual's use of a drug that was prescribed for her. She testified that during the Christmas 2002 holiday she was visiting her mother. The individual called her indicating he had a headache and a sinus infection and was feeling ill. He asked her where he could find the Tylenol. She indicated to him that she had taken the bottle with her and that she did not know if there was any other pain medication in the house. Tr. at 121.

4. The Individual's Drug Abuse Counselor

The individual's drug abuse counselor testified that the individual came to him in November 2004 for a substance abuse assessment. Tr. at 125. His written report dated January 10, 2005 is included in the record as individual's exhibit #5. He testified that the individual's concerns were:

that he had made an agreement not to use marijuana and violated that agreement. His concern was that was going to be seen as he didn't have control or had poor judgment with his subsequent use.

Tr. at 129. The drug abuse counselor met with the individual four times. Tr. at 132. During these evaluation sessions his conclusion was that the individual “was being open, honest, forthright, and giving me, you know, the true picture of what his involvement was.” Tr. at 129.

In addition to the evaluation, the drug abuse counselor provided the individual with an eight week drug prevention education program. The program consisted of two-hour group meetings on Wednesdays and a one-hour private session on Mondays. Tr. at 134. He discussed the individual’s behavior during the treatment:

He definitely voiced his concerns about his past behavior. To me, he took a certain amount of responsibility, exhibited remorse for making the decisions he made, and that he was in a situation where his life has gotten sort of – gotten to the point where he’s been working towards this point for a long period of time, and that he’s – he’s at that point, and this is what he wants to do, and he likes his work, likes his job, and wants to contribute to the mission of the laboratory and his position.

Tr. at 146. The drug abuse counselor indicated that he believes that the treatment has helped the individual mature and that his judgment and reliability have significantly improved. Tr. at 147.

5. The Individual’s Clinical Psychologist

The individual engaged the clinical psychologist to perform an evaluation of the individual’s current psychological status. The clinical psychologist reviewed the 42 documents provided by the DOE, administered two written tests and met with him on two occasions. Tr. at 152. His written report, dated December 20, 2004, is included in the record of this proceeding as individual exhibit #8. The evaluation of the written tests entitled “Rorschach Interpretation Assistance Program Interpretive Report” authored by two PhD psychologist and “Personality Assessment Inventory, Clinical Interpretive Report” authored by another PhD psychologist were submitted by the individual in a post hearing submission. The clinical psychologist testified that the presenting issue was that the individual had violated a drug certification, causing a concern about the individual’s trustworthiness. Tr. at 153. The clinical psychologist discussed his opinion of the individual during the evaluation process:

[The individual] presented me, I thought, with a very complete picture. There wasn’t anything that I asked him that he wasn’t willing to talk about and do so, I thought, honestly, certainly.

Tr. at 157. He also described his impressions of the individual’s candor.

He was very clear with me. His discussion with me was consistent with his PSI. It was consistent with the forms that he filled out and application for his clearance, and I thought he was very clear about what was going on.

Tr. at 158.

He indicated that his evaluation was that the individual shows “. . . a very strong sense of guilt, shame and remorse. This is someone who genuinely regrets the actions that he has taken, and he takes it out on himself.” Tr. at 156.

In his report the clinical psychologist indicated:

[the individual] is in fact experiencing a sense of guilt, shame, remorse and regret for actions which he has taken These findings are particularly important as they relate directly to the likely effectiveness of treatment. . . . [The individual] appears to be experiencing a sufficient amount of discomfort to indicate that the overall probability of successful treatment outcome is higher . . .

Clinical psychologist's report at 8. The report concluded:

Given the overall clinical picture and taking particular note of [the individual's] efforts at rehabilitation, it is the examiner's opinion that [the individual] may indeed be more honest, reliable or trustworthy than his prior actions may indicate . . .

Clinical psychologist's report at 8.

At the hearing the clinical psychologist was asked to provide support for his position that the individual will not repeat his past behavior.

[The individual] is much farther along his own road in terms of his life. He's clearly a much more mature individual than he was at that point in time, and an individual who appears, again, based upon the testing work that I did with him, to have learned a lesson here. That's why I tried to underline, in talking about this, the indices on the testing of guilt, shame and remorse. These are very, very specific responses. There would be no way for him to know what he was supposed to have said on purely projective test that would have allowed me to make such a determination. What that tells me is that this is an individual who has taken the opportunity to take a very – a very difficult look inside, who has not necessarily liked what he's seen, and has taken steps to alter that within himself. That makes him, in my opinion, a person very different than he was at the time that he violated the terms of the agreement.

. . . He was very straightforward about it, admitted to what he had done, and based upon the testing, has had an opportunity now to carefully look inside of himself and take steps to make the changes which are necessary.

. . . this is an individual who has traveled some distance in terms of understanding what he did, why he did it, and what he was going to need to do in order to not do anything like that ever again.

Tr. at 161.

6. Co-worker

The Co-worker testified that she has known the individual for the 1 ½ years she has been working at the site. Tr. at 179. The individual has been her unofficial mentor and she occasionally sees him at non-work activities. Tr. at 180. She testified that she was surprised when the individual told her he has previously used marijuana. Tr. at 181. She believes he is an honest and trustworthy person. Tr. at 184. She believes that the individual takes his responsibilities very seriously. Tr. at 185.

7. Second Co-worker

The second co-worker has known the individual since he worked with him in 1999. Tr. at 194. In 1999 and 2000 in addition to working with the individual he socialized with him. Tr. at 197. He believes the individual is reliable, trustworthy and honest. Tr. at 199. He believes that the individual will never again use marijuana. Tr. at 201.

8. Individual's Team Leader

The individual's team leader testified that he has known the individual since 1995, when they were both graduate students working for the same employer. Tr. at 205. Initially their relationship dealt with school and work. However, since that time they have socialized on many occasions and more recently their families have socialized on several occasions. Tr. at 208. He testified that he believes the individual is an excellent employee who follows through on his commitments and delivers excellent technical quality work. Tr. at 212. He believes the individual is reliable and trustworthy. Tr. at 213. He testified that he has seen a maturing process in the individual, especially since the birth of his daughter. He believes the individual has developed coping skills and that he is committed to setting a good example for his family. Tr. at 215. He believes the individual has committed not to use marijuana in the future. Tr. at 215. He summarized his testimony by indicating

I don't know how you guys go about making your decision here. I think, you know, to me, the issue is trust, is [the individual] going to do what he says he is going to do and can we trust [the individual] not to divulge secrets, not to do this again. I can tell you, as a supervisor, but also as someone who knows [the individual], I think that, you know, his actions over the past three years have demonstrated that he is trustworthy and he will follow through with what he does and we will not have issues.

Tr. at 218.

III. REGULATORY STANDARD

In order to frame my analysis, I believe that it will be useful to discuss briefly the respective requirements imposed by 10 C.F.R. Part 710 upon the individual and the hearing officer. As

discussed below, once a security concern has been raised, Part 710 clearly places upon the individual the responsibility to bring forth persuasive evidence concerning his eligibility for access authorization, and requires the hearing officer to base all findings relevant to his eligibility upon a convincing level of evidence. 10 C.F.R. §§ 710.21(b)(6), 710.27(b), (c), (d).

A. The Individual's Burden of Proof

It is important to bear in mind that a DOE administrative review proceeding under this Part is not a criminal matter, where the government would have the burden of proving the defendant guilty beyond a reasonable doubt. Once a security concern has been raised, the standard in this proceeding places the burden of proof on the individual. It is designed to protect national security interests. The hearing is "for the purpose of affording the individual an opportunity of supporting her eligibility for access authorization." 10 C.F.R. § 710.21(b)(6). The individual must come forward at the hearing with evidence to convince the DOE that restoring his access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a).

This is not an easy evidentiary burden for the individual to sustain. The regulatory standard implies that there is a presumption against granting or restoring an access authorization. See *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) ("clearly consistent with the national interest" standard for the granting of access authorizations indicates "that security determinations should err, if they must, on the side of denials"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (strong presumption against the issuance of an access authorization). Consequently, it is necessary and appropriate to place the burden of persuasion on the individual in cases involving national security issues. In addition to her own testimony, the individual in these cases is generally expected to bring forward witness testimony and/or other evidence which, taken together, is sufficient to persuade the hearing officer that restoring access authorization is clearly consistent with the national interest. *Personnel Security Hearing (Case No. VSO-0002)*, 24 DOE ¶ 82,752 (1995).

B. Basis for the Hearing Officer's Decision

In a personnel security case under Part 710, it is my role as the hearing officer to issue a decision as to whether granting an access authorization would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. §710.27(a). Part 710 generally provides that "[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all relevant information, favorable and unfavorable, as to whether the granting of access authorization would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). I must examine the evidence in light of these requirements, and assess the credibility and demeanor of the witnesses who gave testimony at the hearing.

IV. ANALYSIS

A. Criterion K Security Concern

I have determined that the individual has resolved the Criterion K security concerns regarding his use of marijuana and his wife's prescription medication. As an initial matter, the drug counselor and the psychologist both convincingly testified that the individual was a recreational user of marijuana who has openly and honestly disclosed his historic use of marijuana. I believe that the individual's use of marijuana was limited and he has fully and voluntarily disclosed his periods of marijuana use to the DOE, his family, and co-workers. The individual used marijuana before 1982 and for various periods from 1984 through 2001. The testimony by the individual indicates during the period 1998 through 2001 he greatly reduced his use. I was convinced by the individual's testimony and the expert's opinion of his testimony that in 2001 he committed to never again using illegal drugs. The individual, his wife, friends and co-workers testified that the individual is dedicated to his job and his two year old daughter and they believe that means that the individual will never again use marijuana.

Furthermore, the drug counselor and the individual's psychologist independently testified that the individual's own evaluation of his drug use and its effect on his life has resulted in a permanent change in his view of marijuana use. They believe he will not use marijuana in the future. I agree. I therefore believe the Criterion K concern relating to his use of marijuana has been mitigated.

I am also convinced that the one time use of his wife's prescription drug was caused by an unfortunate circumstance and was a mistake that will not be repeated. Therefore the overall Criterion K concern has been resolved.

B. Criterion L Security Concern

The criterion L concern, which relates to the individual's failure to adhere to his promise not to use illegal drugs set forth in his 1982 drug certification, is more difficult to mitigate. Violation of a written agreement upon which an access authorization is granted is a breach of trust. The record indicates that in 1982, when the individual signed the drug certification, he fully understood the terms of his commitment. At first the individual tried to live up to that commitment. However, between 1984 and 1986 he succumbed to peer pressure and violated the drug certification on numerous occasions. In addition, the individual knew that he violated the commitment and he knowingly failed to disclose the violation to the DOE. The individual believes he has demonstrated that he has changed and matured in the 20 years since he violated the drug certification. He believes those changes demonstrate that he will not again violate a commitment to the DOE or violate a security rule. Therefore, he believes he has mitigated the security concern related to his failure to abide by his drug certification. I agree.

The first mitigating factor is the length of time since the violation of the drug certification occurred. The violations occurred 20 years ago, between 1984 and 1986. In 1984 he was 26 years old and easily influenced by pressures from his friends to conform. I believe that the actions of a person in his twenties are less predictive of the behavior of a more mature person nearer to the age of fifty. This individual has demonstrated significant changes in his attitudes and life style. Since 1986 he

has graduated from college, received a masters degree and a PhD. He has married and recently become a father. In contrast, in 1984 he was a young man with no responsibilities and he wanted to be accepted by his peers. These changes are profound. He is now a mature professional with a job and is strongly committed to his family. Both the experts confirm that the individual has changed significantly since 1986. Tr. at 146 and 161. They indicated that the individual is much more mature and has “carefully looked inside of himself and taken steps to make the changes which are necessary.” Tr. at 161. The passage of time and the changes in the individual’s life style convinces me that his violation of the drug certification in 1984-1986 does not provide a basis to believe that this individual will again violate a promise to the DOE and are, therefore, important mitigating factors in this case.

The second mitigating factor is the demonstrated overall candor of the individual. During the 2002 PSI and the hearing, the individual provided complete and detailed responses to question about derogatory information. Both the drug abuse counselor and the clinical psychologist also testified that they believed that the individual was unusually candid in providing historical information. Furthermore, the individual has never provided false or misleading information on a QNSP or during a security interview. Clearly the individual’s continuous candor provides a reason to believe that he will adhere to his promises in the future.

The third mitigating factor is the individual’s reporting of the 1984-1986 drug use on a 2002 QNSP. Question 26(a) of the 2002 QNSP asks if in the last 7 years have you used a controlled substance. The individual disclosed his recent use of marijuana in response to that question. Question 26(b) asks: “Have you every illegally used a controlled substance while . . . holding a security clearance . . . ?” The individual disclosed his 1984-1986 marijuana use in response to that question. That drug use was twenty years ago and absent the individual’s disclosure it would be very unlikely to have come to light. I believe the reporting of the 1984-1986 drug use on the QNSP is an indication of the individual’s commitment to honesty and recognition of the importance of security regulations. Therefore, the reporting of the drug use on his 2002 QNSP is a mitigating factor.

The final mitigating factor is that the people who know the individual and have worked with him testified he is truly dedicated to his work and fully understands his security responsibilities. I was convinced that the individual has demonstrated a full commitment to his job and his family and has demonstrated to his supervisors and co-workers that he understands and will carry out his security responsibilities. Also his candor during the 2002 PSI and the hearing demonstrates that he is committed to meeting those responsibilities.

The passage of time, the significant personal changes undergone by the individual, his overall candor with the DOE in recent times and the persuasive testimony of experts and character witnesses are very strong factors that lead me to conclude that the Criterion L security concern has been mitigated. Therefore, I believe the individual has resolved the Criterion L security concern.

VI. CONCLUSION

I have concluded that the individual has mitigated the DOE security concern under Criteria K and L of 10 C.F.R. § 710.8. In view of the record before me, I am persuaded that restoring the individual's

access authorization would not endanger the common defense and security and would be clearly consistent with the national interest. Accordingly, I find that the individual's access authorization should be restored.

The review procedures applicable to proceedings under Part 710 were revised effective September 11, 2001. 66 Fed. Reg. 47061 (September 11, 2001). Under the revised procedures, the review is performed by an Appeal Panel. 10 C.F.R. § 710.28(b)-(e).

Thomas L. Wieker
Hearing Officer
Office of Hearings and Appeals

Date: February 25, 2005